Supreme Court, U.S.
FILED
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(28)

No. 00-730

In The

Supreme Court of the United States

ADARAND CONSTRUCTORS, INC.,

Petitioner,

v.

NORMAN Y. MINETA, Secretary of the United States Department of Transportation, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S REPLY BRIEF

WILLIAM PERRY PENDLEY*
STEPHEN P. GILMARTIN
J. SCOTT DETAMORE
MOUNTAIN STATES LEGAL FOUNDATION
707 Seventeenth Street, Suite 3030
Denver, Colorado 80202
303-292-2021
Attorneys for Petitioner
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

27 pp

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Supplemental Statement of Facts	1
Argument in Reply	4
I. Continuing Lack of Equal Footing Ensures Standing	4
A. Despite The Benchmark Study, DOT Still Harms Adarand With Compulsory DBE Subcontracting Plans	4
B. Adarand Did Not Waive Standing	7
II. The Record Contains No Evidence Of Compelling Interest	9
III. The Record Contains No Evidence Of Narrow Tailoring	16
Conclusion	20

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT CASES

City of Edmond v. Robinson, 517 US 1201 (1996) 6

H.L. v. Matheson, 450 US 398 (1981) 7

Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc., 452 US 264 (1981) 11

Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 US 574 (1986) 19

Nelson v. Adams USA, Inc., 529 US 460 (2000) 8

Northeastern Fla. Chapter, Assoc'd Gen. Contractors of Am. v. Jacksonville, 508 US 656 (1993) 6

Pennell v. City of San Jose, 485 US 1 (1988) 1

Turner Broad. Sys., Inc. v. FCC, 520 US 180 (1997) 12

United States v. Doe, 465 US 605 (1984) 9

United States v. Hays, 515 US 737 (1995) 7

Warth v. Seldin, 422 US 490 (1975) 1, 8

FEDERAL CIRCUIT COURT CASES

Aramburu v. The Boeing Co., 112 F.3d 1398 (10th Cir. 1997) 19

Athens Lumber Co., Inc. v. Federal Election Com'n, 689 F.2d 1006 (11th Cir. 1982) 4

Builders Ass'n of Greater Chicago v. County of Cook, 256 F.3d 642 (7th Cir. July 6, 2001) 10, 11

Frank v. United States, 78 F.3d 815 (2nd Cir. 1996) 7

Gilbert v. Shalala, 45 F.3d 1391 (10th Cir. 1995) 8

TABLE OF AUTHORITIES – Continued

Page

Hitchcock v. Wainwright, 770 F.2d 1514 (11th Cir. 1985) 4

Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454 (9th Cir. 1986) 4

Riggs v. City of Albuquerque, 916 F.2d 582 (10th Cir. 1990) 8

Rothe Dev. Corp. v. United States Department of Defense, 2001 WL 936318 (Fed. Cir. Aug. 20, 2001) 10, 12

FEDERAL DISTRICT COURT CASES

Associated General Contractors of America v. City of Columbus, 936 F.Supp. 1363 (S.D. Ohio 1996), *vacated on jurisdictional grounds*, 172 F.3d 411 (6th Cir. 1999) 15

Concrete Works of Colorado, Inc. v. City and County of Denver, 86 F.Supp.2d 1042 (D. Colo. 2000) 14

Webster v. Fulton County, 51 F.Supp.2d 1359 (N.D. Ga. 2000), *aff'd*, 218 F.2d 1276 (11th Cir. 2000) 14

STATUTES

Securities and Exchange Act of 1934 (as amended), 15 USC §§ 78*m*, 78*o* 2

Small Business Act (as amended), 15 USC § 637(d) ...2, 5

Transportation Equity Act for the Twenty-First Century, Pub. L. 105-178, 112 Stat. 113 (June 9, 1998) 2, 13

TABLE OF AUTHORITIES – Continued

Page

REGULATIONS

13 CFR § 121.103 (2001) 2

13 CFR § 121.104 (2001) 2

13 CFR § 121.201 (2001) 2

13 CFR § 124.1002 (2001) 2

48 CFR § 19.201 (2000) 5, 7

48 CFR § 19.1103 (2000) 6

48 CFR § 26.7 (2000)..... 2

48 CFR § 52.219-9 (2000).....1, 2, 5, 8

48 CFR § 52.219-16 (2000)..... 1, 2, 5

48 CFR § 52.219-23 (2000)..... 6

48 CFR § 705-4 (2000) 2

48 CFR § 705-5 (2000) 2

48 CFR § 19.702 (2000) 2, 5

48 CFR § 19.708 (2000) 5

49 CFR § 26.45 (2000) 18

RULES OF PROCEDURE AND EVIDENCE

Fed. R. Evid. 201 1

FEDERAL REGISTER ENTRIES AND OTHER OFFICIAL REPORTS

45 Fed. Reg. 42832 (April 9, 1980) 14

64 Fed. Reg. 52806 (Sept. 30, 1999)..... 7

TABLE OF AUTHORITIES – Continued

Page

65 Fed. Reg. 52470 (August 29, 2000) 2

66 Fed. Reg. 23208 (May 8, 2001) 18

Benchmark Study, 63 Fed. Reg. 35714 (June 30, 1998).....6, 13

Executive Order No. 13170, 65 Fed. Reg. 60827 (Oct. 12, 2000).....5, 16

LEGISLATIVE HISTORY

Government Accounting Office Report on Disadvantaged Business Enterprise Programs, 147 Cong. Rec. S7078-79 (June 28, 2001)..... 14

H. Rep. No. 95-949 (1978)..... 19

TREATISES

Wayne H. LaFave, *et al.*, *Criminal Procedure* § 10.3(b) (2nd Ed. 1999) 11

SUPPLEMENTAL STATEMENT OF FACTS

Respondents once again assert that Adarand lacks standing, Brief for the Respondents (Resp.) 17, thereby compelling Adarand to heed this Court's "strong[ ] suggest[ion]" to "take pains to supplement the record in any manner necessary to enable [this Court] to address [the] question of standing with as much precision as possible." *Pennell v. City of San Jose*, 485 US 1, 8 (1988); *Warth v. Seldin*, 422 US 490, 501 (1975). Accordingly, Adarand lodges with this Court a series of public records that pertain to standing, provides this supplemental statement of facts, and devotes a substantial portion of this Reply to refuting Respondents' meritless contentions in this regard.

In the year and half since this Court last ruled in this case, DOT has let at least three Colorado contracts that are directly relevant to standing in this case: the Dolores-Rico Project, the Mesa Verde Main Entrance Road Project, and the Taylor River Road Project. Exs. A-C.[1] The Proposal or Invitation for Bid for all three projects included two key contract provisions: 48 CFR § 52.219-9 ("Small Business Subcontracting Plan") and 48 CFR § 52.219-16 ("Liquidated Damages – Subcontracting Plan"). Exs. A 61; B 246; C 391. Those clauses execute the provisions of section 8(d)(4) and 8(d)(6) of the Small Business Act that require ordinary prime contractors on ordinary prime contracts to submit plans to hire racially-

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[1] All references to Exhibits refer to Petitioners Lodging. These public records reproduced are obtainable by FOIA or open records requests to DOT, the General Accounting Office (GAO), the Securities and Exchange Commission (SEC), and the Colorado Department of Transportation. In the context of this brief, the accuracy of these sources cannot reasonably be questioned. Since the documents therefore contain facts that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," the facts are suitable for judicial notice. Fed. R. Evid. 201.

defined Disadvantaged Business Enterprises (DBEs) as subcontractors, instead of companies like Adarand.[2] 15 USC §§ 637(d)(4)(F), (d)(8); 48 CFR §§ 19.702, 705-4, 705-5, 52.219-9, 52.219-16. The same clauses were present in the West Dolores River contract underlying this case. Resp. 90a-100a; 202a-205a. As Respondents concede, these clauses apply unless the prime contract is a particularly small one (under $1 million) or the prime contractor is an SBA-certified small business concern. Resp. 8. When the clauses apply, failure to submit such a DBE subcontracting plan renders a prime contractor ineligible for award of the prime contract, and failure to execute the plan in good faith is punishable by liability for liquidated damages. *Id.*

As second lowest bidder, Mountain Gravel and Construction Company nearly won the Dolores-Rico project. Ex. D. Mountain Gravel is the same prime contractor that awarded the guardrail subcontract on the West Dolores River Project to a DBE instead of Adarand in 1989, spawning this litigation. Pet. App. 209. Mountain Gravel is not a small business concern.[3] Accordingly, Mountain Gravel would have been ineligible to compete for the prime contract if it had not submitted a plan to hire DBE subcontractors instead of Adarand. 48 CFR § 19.702(a)(2).

With a low bid of just under $4.4 million, Nielson's, Inc. won the Dolores-Rico prime contract on February 24, 2000. Exs. D, G. Nielson's, Inc. also won the Mesa Verde

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[2] "Small Disadvantaged Businesses" (SDBs) are functionally equivalent to DBEs in all respects pertinent to this case. Petitioner's Brief on the Merits 8-9, 9 n.5; Resp. 8, 8 n.1; 13 CFR § 124.1002 (2001); 48 CFR § 26.7 (2000). For purposes of this Reply, therefore, references to "DBEs" include "SDBs."

[3] Mountain Gravel is owned by CRH plc, a conglomerate with billions of dollars in annual revenues during the relevant period. Ex. L 763, 823, 842 (SEC form 20F annual report of CRH required by 15 USC §§ 78*m*, 78*o*); 13 CFR §§ 121.103, 121.201, 121.104(b); Pub. L. 105-178 § 1102(b)(2)(A); 65 Fed. Reg. 52470 (August 29, 2000).

Main Entrance prime contract on September 28, 2000 with a low bid of over $2.7 million. Exs. E, H. Neilson's is not a small business concern. Exs. G 722; H 732. Because neither Nielson's nor the projects it won were small, DOT required Nielson's to submit and abide by a DBE subcontracting plan for each project on pain of potentially hefty fines. Nielson's complied. Ex. I. The two projects included $59,220.00 and $36.900.00 in guardrail subcontracting opportunities, respectively. *See* Engineer's Estimates: Exs. D 654, 660; E 674, 685, 696. In its DBE subcontracting plans, Nielson's represented that in order to fulfill its contractual and statutory obligations, Nielson's would hire DBE-certified Gonzalez Construction for both guardrail subcontracts. Exs. I 738; J 746. Gonzalez Construction is the same DBE to whom Mountain Gravel awarded the West Dolores River guardrail subcontract in 1989. Pet. App. 209. Adarand submitted bids to Nielson's for both subcontracts, but Nielson's executed its compulsory plan and hired Gonzalez instead, twice. Ex. M, ¶¶ 7, 9.

Weeminuche Construction Authority won the Taylor River Road prime contract with a bid of approximately $5.9 million on August 27, 2001. Ex. K. Weeminuche is not a small business concern and therefore was also required to submit a DBE subcontracting plan and execute it in good faith. The Appendix to the Invitation to Bid even included a detailed sample of such a plan. Ex. C 641, *et seq*. The Taylor River Road project included $33,750.00 in guardrail subcontracting opportunities. Ex. F 704, 709. Adarand submitted a bid, but Weeminuche hired Gonzalez instead. Ex. M, ¶¶ 8, 9.

Adarand continues to bid for virtually all guardrail opportunities for which it is permitted to bid. Ex. M. ¶ 6. *See infra*, n.8. Adarand also continues to compete with and lose business to Gonzalez and other DBEs. Ex. M, ¶ 9.

ARGUMENT IN REPLY

I. Continuing Lack of Equal Footing Ensures Standing.

Rejecting Respondents' standing challenge in 1995, this Court reiterated that "the injury in cases of this kind is that a discriminatory classification prevents the plaintiff from competing on an equal footing." Pet. App. 210. Because Adarand seeks only prospective relief, this Court explained, the only question as to standing is "whether Adarand has made an adequate showing that sometime in the relatively near future it will bid on another Government contract" that includes artificial motivation to hire DBEs instead of Adarand.[4] Pet. App. 211. Accordingly, this Court held that Adarand has standing because: (1) DOT "is likely to let contracts involving guardrail work" that contain such artificial motivation "at least once per year in Colorado"; and (2) Adarand is "very likely" to compete with DBEs to win that work. Pet. App. 212. Those findings remain true.

A. Despite The Benchmark Study, DOT Still Harms Adarand With Compulsory DBE Subcontracting Plans.

Respondents attempt to escape the scrutiny of this Court by insisting: "[i]n the context of direct federal procurement . . . DOT *precludes* the use of race-based criteria *unless* the Department of Commerce's benchmark

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[4] For purposes of standing analysis, surely, there is no legally cognizable difference between the incentive of offering more money for hiring DBEs, like SCC clauses, and a threat of taking money away, like liquidated damages clauses. In fact, the threat *is* an incentive. *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1460 n.6 (9th Cir. 1986) ("the threat of governmental suit would still serve as an incentive"); *Hitchcock v. Wainwright*, 770 F.2d 1514, 1525 (11th Cir. 1985) ("legislative use of . . . threat as an incentive"); *Athens Lumber Co., Inc. v. Federal Election Com'n*, 689 F.2d 1006, 1014 (11th Cir. 1982) ("he is subject to the same threat of . . . penalties and therefore has equal incentive").

study finds disparities in the relevant market." Resp. 37 (emphasis in original). Although their brief is peppered with such statements, *e.g.* Resp. 3, 7, 9, 10, 17, 22, 23, 36, 37, 38, 42, 46, repetition does not cure mistake. In reality, current federal law still threatens prime contractors with financial liability if they fail to attempt to hire DBEs instead of Adarand, despite the Benchmark Study. Respondents admit section 8(d)(4) requires DBE subcontracting plans from ordinary prime contractors on ordinary prime contracts. Resp. 8. Respondents also admit that failure to execute such plans in good faith exposes prime contractors to liquidated damages, and that 48 CFR section 19.201(b) governs the effects of the Benchmark Study.[5] Resp. 8, 9; *compare* Brf. 14. Contrary to Respondents' contentions, however, that regulation makes plain that the Benchmark Study has no effect whatsoever on the compulsory nature of DBE subcontracting plans. Instead, the Benchmark Study purportedly determines only whether "a price evaluation adjustment . . . an evaluation factor . . . and monetary subcontracting incentive clauses" like the SCC are "authorized." 48 CFR § 19.201(b). Compulsory DBE subcontracting plans are not mentioned. *Id.* Nor do Respondents ever provide any citation for their insistence that the Benchmark Study bars such plans. Furthermore, DOT is under Executive Order to enforce liquidated damages provisions aggressively. EO 13170 § 2(a)(xi), 65 Fed. Reg. 60827 (Oct. 12, 2000). The Dolores-Rico, Mesa Verde Main Entrance, and Taylor River Road projects demonstrate beyond dispute that DBE subcontracting plans remain compulsory today.[6] Adarand obviously cannot compete

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[5] *See also* Defendants' Answers to Plaintiff's Second Set of Interrogatories no.6 (Exhibit H to Plaintiff's Motion for Summary Judgment, filed May 2, 1996); 15 USC § 637(d)(4)(B, F), (d)(8); 48 CFR §§ 19.702, 19.708(b)(2), 52.219-9, 52.219-16.

[6] It also appears that the Benchmark Study did not really prohibit the use of price evaluation adjustments for DBEs in

on an equal footing when prime contractors must seek to hire Adarand's DBE-certified competitors just to avoid fines. Because DOT let all three projects in the past eighteen months, moreover,[7] compulsory DBE subcontracting plans remain likely to prevent Adarand from competing on an equal footing "at least once per year." This likelihood is sufficient to support standing, regardless of whether Adarand or a DBE was low bidder. Pet. App. 210, 212; *Northeastern Fla. Chapter, Assoc'd Gen. Contractors of Am. v. Jacksonville*, 508 US 656, 666 (1993).[8]

Colorado, as it should have. The Proposal or Invitation to Bid for all three recent, post-Benchmark direct-procurement Colorado projects included the contract clause set forth at 48 CFR § 52.219-23 ("Notice of Price Evaluation Adjustment For Small Disadvantaged Business Concerns (Oct. 1999) 10%"). *See* 48 CFR § 19.1103.

[7] The scope of this inquiry seems best limited to the eighteen months that have elapsed since this Court last ruled in this case because in that decision, this Court at least implicitly acknowledged Adarand's continuing standing to sue. The Benchmark Study putatively deprived Adarand of standing starting June, 30 1998. 63 Fed. Reg. 35714. In January 2000, however, this Court found the panel below had "confused mootness with standing." Pet. App. 108. Thus, in accordance with this Court's holdings that it must address standing "even if the courts below have not passed on it, and even if the parties fail to raise" it, *City of Edmond v. Robinson*, 517 US 1201, 1202 (1996), this Court considered standing as well as mootness before declaring "petitioner's cause of action remains alive." Pet. App. 111.

[8] Furthermore, Adarand maintains standing even if the Benchmark Study really did preclude the use compulsory DBE subcontracting plans because, as Respondents themselves pointed out to the panel below, the challenged presumptions also manifest themselves in set-asides for DBEs, for which Adarand is not even eligible to bid. Brief For The Federal Appellants 5 n.5, filed Nov. 13, 1997. Two such race-conscious "non-compete" set-asides valued between $600,000.00 and $3.5 million, are currently outstanding in Colorado. Ex. N. DOT's

B. Adarand Did Not Waive Standing.

Respondents claim Adarand somehow waived its own standing and may not now rely on compulsory DBE subcontracting plans as a basis for standing because, in their view, Adarand "did not properly challenge Sections 8(d)(4) through 8(d)(6) of the SBA in the courts below." Resp. 21. In contrast, this Court has held that "standing is not subject to waiver," *United States v. Hays*, 515 US 737, 742 (1995), and has explicitly cited section 8(d)(4) as a source of harm to Adarand, Pet. App. 105. Further, Respondents have confused the sufficiency of a challenge on the merits with the sufficiency of a basis for standing. Properly analyzed, "standing is a jurisdictional issue, separate and distinct from the merits." *H.L. v. Matheson*, 450 US 398, 430 (1981) (Marshall, J, with Brennan, J. and Blackmun, J., dissenting from denial of standing); *Frank v. United States*, 78 F.3d 815, 831 (2nd Cir. 1996). As a result, even if Adarand had never challenged the constitutional merits of compulsory subcontracting plans, this Court could still consider such plans for purposes of standing. In reality, moreover, Adarand did challenge such plans. Though Respondents seek to limit this case to the terms actually printed on the West Dolores River contract twelve years ago, Resp. 21, that contract included compulsory subcontracting plan and liquidated damages clauses, Resp. App. 202a-205a. Accordingly, Adarand's First Amended Complaint challenged the DBE subcontracting clause expressly.[9] Adarand has argued all

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racial scheme also includes mentor-protégé programs and financial assistance to state and local recipients. Neither is affected by the Benchmark Study. In any event, the purported restrictions on use of race-based contracting criteria are only temporary. Benchmark Studies are supposed to be performed "on an annual basis" and a new one is long overdue. 48 CFR § 19.201(b); 64 Fed. Reg. 52806 (Sept. 30, 1999).

[9] In reviewing a question of standing there is often no need to venture outside the allegations of the Complaint, which must

along, in fact (and Respondents admitted long ago) that *all* manifestations of the race-based presumptions of disadvantage are at issue in this case, including 8(d)(4) compulsory DBE subcontracting plans.[10] In light of the

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be treated as true and construed in favor of Adarand. *Warth v. Seldin*, 422 US 490, 501-02 (1975); *Riggs v. City of Albuquerque*, 916 F.2d 582, 587 (10th Cir. 1990) ("Because we do not need to go outside of plaintiffs' complaint to hold that plaintiffs have standing, the parties' attempts to supplement the record are unnecessary"). There is no such need in this case because here, the Complaint alleges: that the West Dolores River Project Proposal and Contract included the contract clause that calls for compulsory DBE subcontracting plans, 48 CFR § 52.219-9 (¶ 17, Resp. App. 202a); that use of that clause, among others, compels prime contractors to discriminate against non-DBE subcontractors like Adarand (¶ 19); that the question on the West Dolores River Project proposal, " 'subcontracting program required?' is marked neither 'yes' nor 'no' " (¶ 6); and that Mountain Gravel & Construction Company was compelled to award the subcontract to Gonzales Construction by the various terms of the contract (¶ 29). These allegations, certainly, were sufficient to meet this Court's requirement that in order to avoid waiver, the lower court need only "be fairly put on notice as to the substance of the issue." *Nelson v. Adams USA, Inc.*, 529 US 460, 469-70 (2000). Further, the panel's conclusions regarding standing are immaterial because standing must be reviewed *de novo*. *Gilbert v. Shalala*, 45 F.3d 1391, 1393 (10th Cir. 1995); *compare* Resp. 14, 22.

[10] For example, Adarand argued below: "Adarand challenged, not just the Subcontracting Compensation Clause (SCC) . . . but also the federal statutes adopted by Congress and the implementing regulations adopted by the Executive[; a]ccordingly, Judge Kane held unconstitutional the entire scheme." Appellee's Response In Opposition To Appellant's Motion To Dismiss Appeal As Moot 2 n.1, filed September 4, 1998, and "the SCC is not the issue; the federal statutes are the issue; [w]hether Federal Defendants employ the SCC or drop it and employ some other device [such as compulsory DBE subcontracting plans] to implement these unconstitutional statutes is irrelevant," Adarand Constructors, Inc.'s

record and the law, therefore, Adarand cannot be held to have waived its standing.

II. The Record Contains No Evidence Of Compelling Interest.

Respondents' attempts to alter the standard of review and to narrow the scope of the case, Resp. 19, 25, need not long detain this Court because *certiorari* was granted for the express purpose reviewing the record *de novo* in order to address the constitutionality of the entire DBE program.[11] In the course of Respondents' discussion, moreover, they affirmatively concede several key points

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Supplemental Brief 13, filed April 4, 2000. Further, Respondents' assertion that Adarand did not challenge the panel's denial of standing to challenge 8(d)(4-6) mischaracterizes Adarand's Petition for *Certiorari*, which cites those provisions expressly and reiterates: "the SCC is not the federal program at issue in this case; [the SCC] is only a small part of the entire federal race-based highway construction contracting program, that is, one mechanism by which that program is implemented." Pet. 2, 3 n.1. In fact, Respondents themselves explained to the panel that the district court had held: "neither the SCC nor the various federal statutes incorporating the 8(d) presumption and setting goals for DBE participation in federal contracting were narrowly tailored." Motion By The Federal Appellants To Dismiss Appeal As Moot And To Vacate The District Court Judgment 3, filed Aug. 19, 1998. Such statutes indisputably include 8(d)(4-6)'s requirements for compulsory DBE subcontracting plans and liquidated damages.

[11] Though Respondents argue that this Court should be "reluctan[t] to disturb findings of fact in which two courts below have concurred," Resp. 25, the "traditional reluctance" to review factual conclusions regarding the sufficiency of evidence has no bearing on this case. Instead, this Court owes no deference to any factual finding that "has no support in the record," and granted *certiorari* for the express purpose of deciding whether the evidentiary standard was misapplied. *United States v. Doe*, 465 US 605, 614 (1984). Furthermore, though

and fail to deny others, further clarifying the parties' mutual agreement on seven major issues. First, Respondents make no attempt to argue that Congress' power to pass the DBE program is derived from section five of the Fourteenth Amendment. Their reliance on Congress' spending power instead, Resp. 35, only begs the question

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Respondents suggest that "[f]ederal courts do not sit as peer review boards to conduct *sua sponte* review of congressional findings," Resp. 32, that contention fails to account for the huge body of case law wherein federal courts have routinely stricken allegedly benign racial classifications on the grounds that legislative findings were inadequate. In fact, just in the time elapsed since Adarand submitted its most recent brief to this Court, two more federal Circuit Courts of Appeals concurred that Congressional and other legislative findings must be scrutinized in close detail. *Rothe Dev. Corp. v. United States Department of Defense*, 2001 WL 936318, *16 (Fed. Cir. Aug. 20, 2001) (reversing summary judgment for the Department of Defense and ordering district court to undertake extensive, specific, fact finding regarding Congressional racial classification); *Builders Ass'n of Greater Chicago v. County of Cook*, 256 F.3d 642, 645-46 (7th Cir. July 6, 2001) (striking affirmative action program for lack of evidence of compelling interest) (Posner, J.). Further, though Respondents attempt to restrict this case to a challenge of "the statute and regulations on their face," Resp. 19, the argument requires little attention because challenging a regulation "on its face" is identical to challenging the underlying statute "as applied." In addition, Respondents' argument is incompatible with strict scrutiny, as demonstrated by their reliance on cases in which this Court did not apply strict scrutiny. Resp. 20. Although actual discrimination of the requisite severity and effect against a single individual might happenstantially justify application of the DBE presumptions to that one person, it is absurd to suggest that, without more, this mere possibility provides the necessary strong basis in evidence of a compelling interest and narrow tailoring necessary to support enactment of the racial classification in the first place. In other words, a statute is facially invalid if it is incapable of constitutional application, Brf. 42, but the converse is not necessarily true.

because the Fifth Amendment strictly limits the spending power. *Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc.*, 452 US 264, 268 (1981). Second, unlike many members of Congress, Respondents do not assert that "diversity" could ever justify compulsory racial discrimination by government.[12] Resp. 24; *compare* Brf. 38-39 nn.27-33. Third, Respondents do not dispute that they bear the ultimate burden of proof, despite that several Circuits have departed from this Court's teachings in this regard.[13] Brf. 23. Fourth, Respondents concede that in order to meet their burden, they must adduce a "strong basis in evidence" of a compelling interest. Resp. 35. Fifth, they concede that TEA-21's direct-procurement DBE program is unconstitutional unless the necessary strong basis in evidence shows Congress enacted the program as a "last resort." Resp. 24. Sixth, by presenting disparity studies to this Court, Respondents seem to agree that evidence in the form of such studies is necessary. Brf. 29. Seventh, though Respondents note the panel's conclusion that Congress need not make findings specific to each group entitled to the presumptions, Respondents never argue that the panel was correct in this regard. Resp. 17. It was not. Brf. 49. In addition, though Respondents faintly contend that post-enactment evidence could suffice to justify the DBE program, Resp.

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[12] Further, whereas Respondents rely on "passive participation," Resp. 24, they present no evidence whatsoever that DOT has been sufficiently complicit in discrimination by others to satisfy that standard, *e.g.*, by knowingly funding projects wherein prime contractors engaged in racial discrimination. *County of Cook*, 256 F.3d at 645.

[13] Placing the ultimate burden of proof on Respondents in this case is consistent with the federal requirement that the prosecution bears the ultimate burden of proving in Fourth Amendment search and seizure cases that the government acted with a warrant, or in the absence of a warrant, that the search was constitutional. Wayne H. LaFave, *et al.*, *Criminal Procedure* § 10.3(b) (2nd Ed. 1999).

25, the law on this point is clear as well: post-enactment evidence is of no value in compelling interest analysis.[14] Brf. 35; *Rothe Dev. Corp. v. United States Department of Defense*, 2001 WL 936318, *13-14 (Fed. Cir. Aug. 20, 2001) (and cases marshaled there). Finally, it is now clear that "there is no difference in the evidentiary burden that must be faced during litigation (*i.e.*, a 'strong basis in evidence') and the evidence that a legislature must have before it when it enacts a racial classification." *Rothe*, 2001 WL 936318 at *13 (and cases marshaled there).

Given these concessions and operative law, at least three insurmountable obstacles prevent Respondents from carrying their burden. First, Respondents' reliance on material as much as thirty years old cannot possibly comport with the requirement for contemporaneous evidence of a compelling interest. Even if there had been a valid study to supported enactment of the DBE program in ISTEA (the predecessor highway funding bill to TEA-21), if the program accomplished even some of what Congress allegedly intended it to do, that study would no longer be accurate within a few years. Therefore, assuming such a study existed, it could not support re-enactment of the DBE program in TEA-21 unless and until that study was repeated with fresh data. No new or repeat study was ever done, however. Consequently, evidence not contemporaneous with and designed to support enactment of TEA-21 cannot constitute the requisite strong basis in evidence.[15]

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[14] In asserting that post-enactment evidence may be considered, Respondents rely on an inapposite case in which this Court "appl[ied] the standards for intermediate scrutiny" only. *Turner Broad. Sys., Inc. v. FCC*, 520 US 180, 189 (1997); Resp. 25.

[15] Because there is no evidence specific to enactment of TEA-21, Respondents found themselves forced to ascribe their compendium of items from ISTEA to both ISTEA and TEA-21. Resp. 196a-97a.

Second, though Respondents adduce seven construction industry disparity studies by name, submit several to this Court, and urge this Court to consider them, none of those studies assists in establishing a strong basis in evidence. The studies include: the Benchmark Study, a meta-study contained in the GAO report, a meta-study conducted by the Urban Institute, studies from the states of Colorado and Louisiana, and studies from the cities of Denver and Atlanta. As an initial matter, there is no evidence that in enacting TEA-21 Congress actually considered any of these studies. They are only mentioned in floor statements, which are insufficient to support a compelling interest.[16] Brf. 37-37 n.26. In addition, Respondents rely most heavily on the Benchmark Study and GAO Report, *e.g.*, Resp. 31, 37, but neither one existed when Congress passed TEA-21. 63 Fed. Reg. 35714 (June 30, 1998); Pub. L. 105-178, 112 Stat. 113 (June 9, 1998); Gov't Lodging 1847 (June 2001). Furthermore, the GAO Report decimates the notion that it, or any of the studies it analyzed, could form the basis of a compelling interest:

> the limited data used to calculate disparities, compounded by the methodological weaknesses, create uncertainties about the studies' findings. . . . While not all studies suffered from every problem, each suffered enough problems to make its findings questionable. We recognize

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[16] Respondents' comments regarding the utility of Congressional floor managers' statements refer to statutory construction only, and have no bearing on this case. Resp. 32 n.14 (and cases cited there). Further, many of Respondents' citations demonstrate the dangers of relying on floor statements, *e.g.* the allegation that "minorities own nine percent of construction firms but receive only four percent of construction receipts," Resp. 30-31 n.12, 27 n.7, misleadingly ignores that prime contractors by definition receive greater receipts than the subcontractors they hire, and that DBEs "are small businesses . . . more likely to compete for subcontracts . . . than prime contracts . . . . " GAO Report, Gov't Lodging 1869.

> there are difficulties inherent in conducting disparity studies and that such limitations are common to social science research; however, the studies we reviewed did not sufficiently address such problems or disclose their limitations.

GAO Report 29 (Gov't Lodging 1877).[17] One of the studies GAO so direly impugned was the 1998 study of the highway construction industry in Colorado that Respondents inexplicably submit as evidence in their favor. Petitioner's Lodging, Ex. O (a list of the 14 studies GAO analyzed, obtained by FOIA request; *see supra*, n.1). Respondents' attempted reliance on disparity studies from Denver and Atlanta is even more misplaced. Resp. 30, 31 n.12, 34. Both were thoroughly discredited by federal courts long ago.[18] Respondents' reliance on the Louisiana study is curious: they cite an anecdote about anti-Semitism, Resp. 30 (Gov't Lodging 197), but of course anecdotes about anti-Semitism cannot support a racial preference for people who are not Jewish. Perversely, moreover, SBA *denied* the presumptions of disadvantage to Hasidic Jews. 45 Fed. Reg. 42832 (April 9, 1980). Finally, not one of the studies Respondents rely on was ever submitted to any Court in this case for the necessary searching review – until now. The Denver study still has

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[17] *See also*, Government Accounting Office Report on Disadvantaged Business Enterprise Programs, 147 Cong. Rec. S7078-79 (June 28, 2001).

[18] Denver: "the methodology was not designed to answer the relevant questions, the collection of data was flawed, important variables were not accounted for in the analyses and the conclusions were based on unreasonable assumptions." *Concrete Works of Colorado, Inc. v. City and County of Denver*, 86 F.Supp.2d 1042, 1071 (D. Colo. 2000). Atlanta: "[study] contains no attempt to explain whether the disparity is due to discrimination or other neutral reasons, such as firm size and the ability of a firm to obtain financing and bonding." *Webster v. Fulton County*, 51 F.Supp.2d 1359, 1370 (N.D. Ga. 2000), *aff'd*, 218 F.2d 1276 (11th Cir. 2000).

not been produced.[19] Thus, Respondents have produced no evidence that this Court may rely on in sanctioning the use of discriminatory racial classifications that savage the dignity of thousands of individuals of all races.

Third, Respondents cannot be permitted to rely so heavily on allegations of discrimination in the banking industry. The suspiciously thin Grown & Bates study Respondents submit is devoted to capital access discrimination exclusively. Gov't Lodging 1-17. So are many of the hearings and great portions of the disparity studies Respondents cite. Resp. 28-29, 33, 196a-97a. Surely, though, the "last resort" solution to discrimination in banking must be directed at banks, not guardrail subcontractors. Further, Respondents provide zero evidence that Congress and the Executive have made adequate attempts to enforce anti-discrimination laws in banking. This Court found in *Croson* that the failure to *present evidence* that the government has properly enforced anti-discrimination laws deeply undercuts any effort to establish a compelling interest. 488 US 469, 502 n.3 (1989). Accordingly, in this case the "complete silence of the record concerning enforcement" of anti-discrimination laws in the banking, bonding, and surety industries precludes any credible contention that DBE programs in highway construction are a last resort solution to capital access discrimination.[20] *Id.*

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[19] Respondents' failure to submit the actual studies precluded Adarand from addressing them as specifically as the panel belatedly demanded. *See* Pet. App. 46-47 n.14; Resp. 33. Adarand cannot reasonably be expected to have rebutted every one of the tens of millions of dollars worth of such studies that have been performed since this Court's decision in *Croson*. *Associated General Contractors of America v. City of Columbus*, 936 F.Supp. 1363, 1431 (S.D. Ohio 1996), *vacated on jurisdictional grounds*, 172 F.3d 411 (6th Cir. 1999).

[20] GAO found DOT itself is guilty of slack enforcement and other failures to attempt race-neutral solutions. For example, DOT receives written complaints of discrimination but does not

Finally, Respondents again assert that a decline of DBE participation after DBE programs have ended somehow provides evidence of a compelling interest, but the claim is illogical and unsupported by credible evidence. Whereas Respondents contend that "DBE participation in the state-funded portion of a Michigan highway program fell to zero nine months after that State's DBE program ended," Resp. 31, GAO investigated and determined "Michigan could not provide" the relevant data to support that assertion, and "the analysis showing the decline that is often cited . . . is no longer available." Gov't Lodging 1885. Consequently, GAO "c[ould] not verify the number cited during the debate." *Id.* Neither can Respondents or this Court. Similar problems afflicted other post-program decline analysis Respondents cite. *Id.* Post-program decline therefore cannot help establish a compelling interest.

III. The Record Contains No Evidence Of Narrow Tailoring.

Respondents admit, as they must, that Congress has the power to pass laws that take effect only in some states and only under limited circumstances. Resp. 38. This concession, coupled with the continuing, post-Benchmark Study, nationwide use of 8(a) set-asides and compulsory DBE subcontracting plans, precludes any credible assertion the direct-procurement DBE program is narrowly

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analyze the information to detect any patterns of discrimination that may still persist. Gov't Lodging 1881. In addition, though GAO found "USDOT officials . . . stated that they believe contract bundling is one of the largest barriers for DBEs in competing for transportation contracts," Gov't Lodging 1883, and a recent Executive Order commanded DOT to "submit to the SBA for review any contracts that are proposed to be bundled," EO 13170 § 7, 65 Fed. Reg. 60827. Respondents have submitted no evidence of any attempt to unbundle contracts prior to enactment of TEA-21.

tailored. Based on the Hispanic heritage of its owner, moreover, Gonzalez Construction remains entitled to race-based DOT contracting preferences in Colorado despite that the Colorado disparity study Respondents lodged found Hispanic-owned businesses are already used at 183% of their purported availability on federally funded projects in Colorado. Petitioner's Lodging, Ex. P; Gov't Lodging 678 (Ex. 6-12). To paraphrase Respondents' enchanting understatement, this situation "raises difficult questions" at best. Resp. 36.

Further, much of Respondents' narrow tailoring argument relies on goal setting and achievement regulations that govern state and local recipients of DOT financial assistance, but that do not govern DOT itself. Resp. 5-6, 39, 42-45; *see* Brf. 16 n.10. Since Respondents admit these regulations do not apply in this case, discussion of these regulations may be ignored.[21] Resp. 7. Unaffected by state and local regulations, moreover, the federal goal remains rigid and arbitrary. Recent Executive Order No. 13170 echoes the Small Business Act and demands that DOT "shall establish a goal of achieving a participation rate for [DBEs] of not less than 5 percent" in direct procurement. 65 Fed. Reg. at 60828. The Order leaves DOT no discretion. Further, Respondents have produced no evidence that any Secretary of Transportation in history has considered alteration of DOT's persistent 10% direct procurement goal. Thus, while the record in this case might leave some uncertainty as to whether the SBA 5% goal or DOT 10% goal predominates in DOT direct

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[21] In reality, moreover, many of the cited regulations do not advance narrow tailoring as a practical matter. The "good faith" standard for DBE hiring by prime contractors on state and local projects, *e.g.*, effectively precludes hiring of non-DBE subcontractors because prime contractors still must hire DBEs if their bids are "reasonably competitive." Ex. Q 905. Since "reasonably competitive" is not defined, the only practical way for non-DBE subcontractors to win is to bid so low that reasonable profit is impossible.

procurement, there is no question that the goal operates as a quota.[22]

Whatever the operative goal, moreover, Respondents' reliance on a putative "affidavit of disadvantage" mocks the requirement for individualized inquiry even while effectively admitting the need for victim-specificity. By signing the affidavit, an applicant asserts only that he is a member of a preferred racial group, that he has "acted as a member of that group," and that he has "experienced social disadvantage due the effects of discrimination." 66 Fed. Reg. 23208, 23227 (May 8, 2001). Reproduced as App. 1. There is no temporal limit. There is no severity requirement. In direct contravention of TEA-21, the affidavit does not even require the alleged discrimination or its effects to have occurred in America, let alone in the American construction industry. Brf. 8-9. Thus, a successful business owner who was called names by a stranger one day on a playground on another continent decades ago may sign this affidavit with impunity. The utter boundlessness of the affidavit completely precludes any prosecution for perjury, moreover, despite Respondents' contrary assertions. Resp. 39-40. There simply would be no way to establish the elements of that crime. Notarization of the affidavit does not help. At most, it shows only that the signature is authentic. As a result, the affidavit amounts to nothing more than the signatory's assertion of

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[22] Even if the regulations pertaining to formulation of state goals apply, they do not effectively contribute to narrow tailoring. Those regulations permit the use of Census data and Dun & Bradstreet data instead of any truly reliable indication of the number of "qualified," "willing and able" firms that exist in the region. 49 CFR § 26.45(c)(1). State recipients are permitted merely to "[d]ivide the number of DBEs by the number of all businesses to derive a base figure for the relative availability of DBEs. . . . " *Id.* It does not take a statistician to realize this method takes no account whatsoever of firms' qualifications and current workload, contrary to this Court's holding in *Croson*.

his own, subjective, unsupported opinion that he has been victimized in some unspecified way. In Title VII statutory analysis, the closest available analog, such an affidavit constitutes evidence of nothing. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 US 574, 576 (1986); *Aramburu v. The Boeing Co.*, 112 F.3d 1398, 1408 and n.7 (10th Cir. 1997) ("subjective belief of discrimination is not sufficient"). The affidavit therefore does not advance narrow tailoring.

Finally, Respondents put great stock in the assertion that the race-based presumptions are rebuttable, Resp. 40, but that argument fails as a matter of historical record and as a matter of practicality. In passing the program, Congress unmistakably instructed that the section of the Small Business Act that mandates the presumptions "does *not* allow the awarding agency or the prime contractor to refute *any* presumption with respect to equating ethnic status with disadvantage." H. Rep. No. 95-949, at 11 (1978) (emphasis added). Thus, if materials from the 1970s may be considered as evidence in this case, as Respondents contend, then it is clear this program is not narrowly tailored. Further, current internal management documents from the Small Business Administration make clear that the presumption of social disadvantage is rebutted "only when there is a question of whether or not an applicant is in fact a bonafide member of the designated group," *not* when there is a question as to whether the applicant actually suffered discrimination of the requisite severity and effect. Supplemental Lodging of *Amicus Curiae* Center for Individual Rights 3 no.8. In addition, as a practical matter there is no conceivable way to refute the assertion that someone has "acted as a member" of a racial group, as the affidavit demands, without engaging in the same odious, illegitimate racial stereotyping that the DBE program is supposed to remedy. 66 Fed. Reg. 23227 (May 8, 2001). Nor is there any way DOT could develop tolerable guidelines for determining, for example, whether someone "acts like an Asian" generally, or "like a Tuvaluvan" in particular. It is

also impossible to assert that someone did not suffer sufficiently severe discrimination to entitle him to the presumption of social disadvantage when there are no severity requirements whatsoever. Nor does the DBE scheme contain any indication of any event or circumstance, such as election to the United States Senate or winning a Nobel Prize, that would result in lapse of "socially disadvantaged" status. In any event, compared to requiring that DOT *must* launch a challenge when it has reason to believe a DBE owner is not socially disadvantaged, Respondents' assertion that DOT "may" (or may not) launch such a challenge does not substantially advance narrow tailoring. Resp. 5. In effect, therefore, the presumption of social disadvantage is conclusive and permanent.

CONCLUSION

For the foregoing reasons, all manifestations of the racial classifications inherent in the DOT's direct-procurement DBE program should be found unconstitutional and enjoined.

Respectfully submitted,

WILLIAM PERRY PENDLEY*
STEPHEN P. GILMARTIN
J. SCOTT DETAMORE
MOUNTAIN STATES LEGAL FOUNDATION
707 Seventeenth Street, Suite 3030
Denver, Colorado 80202
303-292-2021
Attorneys for Petitioner
**Counsel of Record*

AFFIDAVIT OF SOCIAL AND ECONOMIC DISADVANTAGE

This form must be signed and notarized for each owner upon which disadvantaged status is relied.

SOCIAL DISADVANTAGE

I hereby certify under penalty of perjury that I am a member of one of the following groups:
❒ African American ❒ Hispanic ❒ Native American ❒ Caucasian ❒ Asian Pacific ❒ Asian Indian
❒ Other Ethnic Group (*explain*) _____

And that I have held myself out as a member of that group and have acted as a member of that group.

I further certify that I am an owner of the company seeking DBE certification and that I have experienced social disadvantage due to the effects of discrimination based upon my (check all that apply)
❒ race ❒ ethnicity ❒ gender ❒ other *(explain)*

Print Name: _____ Signature _____ Date _____

PERSONAL FINANCIAL STATEMENT

I hereby certify under penalty of perjury that my personal net worth does not exceed $750,000.

Print Name: _____ Signature _____ Date _____

This statement is supported by (check one)
❑ A signed, notarized statement of personal net worth, with appropriate supporting documentation.
❑ A signed, notarized statement from a certified public accountant (CPA) attesting that the he/she has examined my personal net worth and determined, consistent with the provisions of §26.67(a)(2) and generally accepted accounting standards, that my personal net worth does not exceed $750,000.

NOTARY CERTIFICATE

STATE OF _____
} SS:
COUNTY OF _____

Subscribed and sworn to before me this _____ day of _____, 20 _____.

Printed/typed name of Notary Public _____

Signature of Notary Public _____

County of residence _____ Date commission expires _____

[FR Doc. 01–11317 Filed 5–7–01; 8:45 am]
BILLING CODE 4910–62–C